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No. 159

IN THE

Supreme Court of the United States

October Term, 1954

UNITED STATES OF AMERICA, *Appellant*

v.

ERNEST KING BRAMBLETT

On Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

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INDEX

Subject Index

Page

Summary of argument 1

Argument

I. The Disbursing Office of the House of Representatives is not a "department or agency of the United States" within the meaning of 18 U.S.C. § 1001 4

II. The legislative history of 18 U.S.C. § 1001 does not support the contention that it applies to matters within the jurisdiction of the Disbursing Office of the House of Representatives 19

III. The penal character of 18 U.S.C. § 1001 requires this Court to construe the word "agency" as applicable solely to the executive branch of the government 21

Conclusion 25

TABLE OF CASES CITED

Bush Terminal Buildings Co. v. *Comm'r*, 204 F. 2d 575 13
Collett, Ex parte, 337 U.S. 55 ..... 5, 19
Fasulo v. *United States*, 272 U.S. 620 23
F.P.C. v. *Panhandle E.P.L. Co.*, 337 U.S. 498 16
F.T.C. v. *Bunte Bros.*, 312 U.S. 349 16
Harrison v. *Vose*, 9 How. 372 22
Krichman v. *United States*, 256 U.S. 363 25
L. A. Tucker Truck Lines v. *United States*, 344 U.S. 33 14
McBoyle v. *United States*, 283 U.S. 25 23
M. Kraus & Bros. v. *United States*, 327 U.S. 614 24
Packard Motor Co. v. *N.L.R.B.*, 330 U.S. 485 19
Pierce v. *United States*, 314 U.S. 306 23
Romney v. *United States*, 167 F. 2d 521, cert. denied 334 U.S. 847 14
United States v. *Adams*, 115 F. Supp. 731 13
United States v. *Cooper Corp.*, 312 U.S. 600 16

Page

United States v. *Fruit Growers Express Co.*, 279 U.S. 363 25
United States v. *Halseth*, 342 U.S. 277 24
United States v. *Harris*, 177 U.S. 305 25
United States v. *National City Lines*, 337 U.S. 78 5
United States v. *Resnick*, 299 U.S. 207 24
United States v. *Strang*, 254 U.S. 491 7
United States v. *Waldin*, 122 F. Supp. 903 14
United States v. *Weitzel*, 246 U.S. 533 25
United States v. *Williams*, 341 U.S. 70 16
United States v. *Wiltberger*, 5 Wheat. 76 22
United States ex rel. Marcus v. *Hess*, 317 U.S. 537 . . 15
Viereck v. *United States*, 318 U.S. 236 24
Western P.R. Corp. v. *Western P.R. Co.*, 345 U.S. 247 5

Statutes Cited

Act of March 4, 1909, c. 321, Sec. 35, 35 Stat. 1095, as amended by the Act of October 23, 1918, c. 194, 40 Stat. 1015, and as further amended by the Act of June 18, 1934, c. 587, 48 Stat. 996 . . . . . 19, 20
Revenue Act of 1939, Section 215(a), c. 247, 53 Stat. 862 13
R.S. §§ 3490-3493 15

United States Code:

Title 2:

Section 92 4

Title 5:

Section 1 4
Section 139c 11
Section 1001 11

Title 18:

Section 6 . . . . . 2, 3, 4, 5, 7, 11, 14, 15, 16, 17, 18, 19, 25
Section 201 . . . . . 6, 10
Section 202 10
Section 281 . . . . . 8, 14
Section 283 10

Page

Section 284 8
Section 286 8
Section 287 8
Section 290 6
Section 437 ..... 8, 9
Section 602 7
Section 607 7
Section 701 9
Section 1001 ..... 2, 3, 4, 5, 11, 14, 16, 19, 21, 25
Section 1505 ..... 9, 10
Section 1621 15

Title 22:

Section 802 12

Title 31:

Section 41 15
Section 42 15
Section 44 14
Section 665 12

Title 41:

Section 103 12

Title 42:

Section 1818 12
Section 1855a 13

Title 44:

Section 304 13

Title 50:

Section 403a 13

Miscellaneous Citations

Rules of the House of Representatives, Rule III 4
Senate Report No. 1202, 73rd Congress, 2nd Session 20

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SUMMARY OF ARGUMENT

The United States District Court for the District of Columbia has granted appellee's motion in arrest of judgment on the ground that the indictment under which he was tried does not charge any offense against the laws of the United States. (R. 9-20.) This indictment alleges that appellee made certain false statements "in a matter within the jurisdiction of a department and agency of

the United States, namely the . . . Disbursing Office of the House of Representatives," in violation of 18 U.S.C. § 1001. (R. 1-8.) Appellee's position is that the Disbursing Office of the House of Representatives is neither a department nor an agency of the United States within the meaning of this statute.

The phrase "department or agency of the United States" has been statutorily defined for the purposes of Title 18 by 18 U.S.C. § 6. This section states that the term "department" refers solely to the so-called Cabinet departments, unless the context demonstrates an intent to describe the executive, legislative, or judicial branches of the government. The same section goes on to state that the term "agency" refers to federal departments, independent establishments, commissions, administrations, authorities, boards, bureaus, and corporations.

A statement made to the Disbursing Office of the House of Representatives is in legal effect made to the Clerk of the House. The Disbursing Office is nothing more nor less than a part of the Clerk's office. It is obvious that the Clerk is neither a "department" nor an "agency" of the United States within the meaning of § 6, because both of these terms as there defined refer exclusively to the executive branch of the government, and the Clerk is part of the legislative branch of the government.

The Reviser's notes to Title 18 demonstrate beyond dispute that this position is in accord with the legislative intent. Many sections of Title 18, moreover, refer specifically *both* to departments and agencies *and* to Congress, which would scarcely be the case if Congress were itself a "department" or an "agency" of the United States. Appellee's position on this issue finds further support in numerous definitions of the term "agency" throughout the United States Code, which indicate that Congress has never regarded this term as an apt description of legislative officers. This conclusion is reinforced by the relevant case law.

Any other result would in effect nullify the perjury laws. If § 1001 covers false statements made to any branch of the federal government, it covers perjury before congressional committees and federal courts. Since this statute carries a heavier penalty than the perjury statute and is not subject to the "two-witness" rule, it is obvious that the perjury laws would long ago have passed into oblivion if appellant's pretaise were correct.

Appellant's attempt to avoid this dilemma by fabricating a definition of the term "agency" which covers the Disbursing Office but not congressional committees or federal courts must fail, because it ignores both the common understanding of the term and the statutory definition of § 6.

There is no occasion to consider the legislative history of § 1001 in this case because its terms, when read in conjunction with the definitions of § 6, are completely free from ambiguity. The background of this statute, however, actually supports appellee's contention that it was intended to apply to the executive branch of the government alone.

Finally, it must be remembered that § 1001 is a penal statute. Under the canons of construction governing such statutes, this Court must be able to say that appellee's acts were plainly and unmistakably within the terms of this statute before it can reinstate his conviction. He cannot be sentenced for an offense which the Congress, though inadvertently, has omitted to condemn, although this Court may be convinced that Congress, if it had thought about the matter, would have employed broader language.

ARGUMENT

I.

The Disbursing Office of the House of Representatives Is Not a "Department or Agency of the United States" Within the Meaning of 18 U.S.C. §1001

The decision in this case hinges upon the legal character of the Disbursing Office of the House of Representatives. This office is concededly a part of the office of the Clerk of the House of Representatives. The Clerk is an officer of the House, elected by the Members at the beginning of each Congress and charged by them with the duty of disbursing their clerk hire allowance to those designated by them as their clerks. 2 U.S.C. § 92; Rules of the House of Representatives, Rule III. The section of the Clerk's office which performs this function is known as the Disbursing Office. (R. 24.) A so-called Clerk Hire form filed with the Disbursing Office of the House, therefore, is in legal effect filed with the Clerk himself. The sole question for decision on this appeal thus becomes whether the Clerk is a "department or agency of the United States" within the meaning of 18 U.S.C. § 1001.

The term "department" is defined for the purposes of Title 18 by § 6 thereof, which provides in part:

> "The term 'department' means one of the executive departments enumerated in section 1 of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government."

It is, of course, evident that neither Congress nor any officer thereof is one of the executive departments enumerated in Title 5, because these departments include only the so-called Cabinet departments. It is likewise clear that there is nothing in the context of 18 U.S.C. § 1001 which remotely suggests that the term "department" was intended to describe the executive, legislative, or judicial branches of the government. Appellant does not

seriously urge to the contrary, preferring rather to rest upon the contention that the Clerk of the House is an "agency" within the meaning of 18 U.S.C., § 1001.

The term "agency" is similarly defined for the purposes of Title 18 by § 6 thereof, which provides in part:

> "The term 'agency' includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, *unless the context shows that such term was intended to be used in a more limited sense.*" (Emphasis added.)

Not even by a strained and unnatural interpretation of the foregoing language can the Clerk of the House of Representatives be brought within its terms. This definition was plainly framed for the sole purpose of providing a simple designation for all of the ramifications of the executive branch of the government, many of which are independent of the Cabinet departments. The definition employs apt words to describe the Civil Service Commission, the Maritime Administration, the Tennessee Valley Authority, the National Labor Relations Board, the National Bureau of Standards, and the Reconstruction Finance Corporation. It certainly does not employ apt words to describe the Clerk of the House of Representatives.

The Reviser's notes to Title 18 demonstrate conclusively that Congress never intended this definition to embrace such officers as the Clerk of the House of Representatives. This Court has repeatedly recognized the very great weight which must be accorded to such authority. *Western P. R. Corp.* v. *Western P. R. Co.*, 345 U.S. 247, 255; *United States* v. *National City Lines*, 337 U.S. 78, 81; *Ex parte Collett*, 337 U.S. 55. As stated in the *National City Lines* case, the Reviser's notes are "obviously authoritative in perceiving the meaning of the Code."

Particularly illuminating is the Reviser's note following 18 U.S.C. § 290, a criminal statute which deals with illegal withholding of military discharge papers and which employs the phrase "any department or agency of the United States":

> "*To clarify meaning of 'executive department'* word 'executive' before 'department' was deleted and *words 'or agency' were inserted after it.*" (Emphasis added.)

If Congress thought it was *clarifying* the meaning of the phrase "executive department" by deleting the word "executive" and adding the words "or agency," so that the phrase became "department or agency," it is absolutely certain that Congress understood the word "agency" as applicable to offshoots of the executive branch of the government, and of the executive branch of the government alone. Otherwise, Congress would have been *expanding* the phrase "executive department" when it deleted the word "executive" and added the words "or agency." The Reviser, however, makes it abundantly clear that there was no intention of expanding this section by the foregoing changes, and hence that the signification of the term "agency" must be limited to the executive branch of the government alone.

Another Reviser's note of great significance follows 18 U.S.C. § 201, a criminal statute which deals with bribery and which employs the phrase "department or agency":

> "Section was expanded to embrace all officers or persons acting on behalf of any independent agencies or Government-owned or controlled corporations by inserting words 'or any department or agency thereof', and by substituting words 'such department or agency' for 'department or office of the Government thereof'.
>
> * * * * *
>
> "When Congress enacted this section as a part of the 1909 Criminal Code, *the present ramifications of the executive branch were not foreseen*, and, consequently, the language proved inadequate to cover

> every new agency as indicated by the holding in the Strang case. [United States v. Strang, 254 U.S. 491, holding that the predecessor of this statute did not cover a Government-owned or controlled corporation.]" (Emphasis added.)

The foregoing language constitutes a clear statement of the legislative purpose behind utilization of the term "agency." This term was defined in 18 U.S.C. § 6 and employed in countless sections of Title 18 solely to provide a simple designation for "ramifications of the executive branch," such as "independent agencies" and "Government-owned or controlled corporations." Of course none of these terms are applicable to the Clerk of the House of Representatives.

Somewhat similar to the foregoing are the notes appended to 18 U.S.C. §§ 602 and 607, which are criminal statutes dealing with political contributions by government employees. Both of these statutes contain the phrase "department or agency." The note to § 602 states:

> "This section, like section 201 of this title, was expanded to embrace all officers or persons acting on behalf of any independent agencies or Government-owned or controlled corporations by inserting words 'or any department or agency thereof.'"

The note to § 607 reads in part:

> "This section was expanded to embrace all officers or persons acting on behalf of any independent agencies or Government-owned or controlled corporations by inserting words 'or any department or agency thereof.'"

Of course legislative and judicial officers are neither "independent agencies" nor "Government-owned or controlled corporations." These notes thus show again that the term "agency" was never intended to embrace such officers.

Two other notes of interest state that the term "agency" was inserted in lieu of the word "bureau." 18 U.S.C. § 281 makes it a crime for certain persons to accept compensation in matters affecting the government, while 18 U.S.C. § 284 makes it a crime for former federal employees to prosecute certain claims against the government. Both of these statutes employ the term "agency." The note to § 281 states:

> "Words 'or any department or agency thereof' were inserted and word 'agency' was substituted for 'bureau' to clarify scope of section."

The note to § 284 states:

> "The word 'agency', as used in said section 119, sixth paragraph, of Title 41, was used in preference to the word 'bureau' which appeared in said section 100 of Title 5."

Here again, it is obvious that legislative and judicial officers are not government "bureaus," and hence that the term "agency" is not understood by Congress to embrace such officers.

Three other pertinent notes state that the term "agency" was inserted in lieu of the word "department" or "departments." 18 U.S.C. §§ 286 and 287 deal with false claims against the government, while 18 U.S.C. § 437 prohibits government employees from holding any interest in certain contracts. All three of these statutes employ the phrase "department or agency." The note to § 286 states:

> "To clarify meaning of 'department' the word 'agency' was inserted after it."

The note to § 287 states:

> "To clarify meaning of 'department' words 'agency' and 'or agency' were inserted after it."

The note to § 437 states:

> "To clarify scope of section words 'department or agency' were substituted for 'of the departments'."

It is obvious that legislative and judicial officers are not "departments" of the federal government within the meaning of the foregoing statutes. Consequently, Congress would never have utilized the term "agency" *to clarify* the meaning of the term "department" if it had believed that the former term embraced such officers.

Another note of interest is appended to 18 U.S.C. § 701, which deals with misuse of official insignia and which employs the phrase "any department or agency of the United States." The Reviser stated with reference to this section:

> "The term 'department or agency' was substituted for 'department or independent office' in two places to embrace all properly constituted agencies as defined in section 6 of this title and to eliminate any possible ambiguity as to scope of section."

Patently, no legislative or judicial officer can be considered a "department" or an "independent office" of the federal government.

Also significant is the note appended to 18 U.S.C. § 1505, which deals with influencing witnesses before designated tribunals and which uses the phrase "any department or agency of the United States." The note following this statute states:

> "Word 'agency' was substituted for the words 'independent establishment, board, commission' in two instances to eliminate any possible ambiguity as to scope of section."

Here again, no legislative or judicial officer can be considered an "independent establishment, board, commission" of the federal government.

The Reviser has thus unequivocally stated that the signification of the term "agency" is limited to the executive branch of the government alone. As pointed out above, such authority is entitled to almost conclusive weight in a case of this nature.

Appellee's position on this issue derives further support from the fact that many sections of Title 18 expressly refer *both* to departments and agencies *and* to Congress. For example, 18 U.S.C. § 201, a criminal statute dealing with the offense of bribery, applies to:

> ". . . any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, . . ."

18 U.S.C. § 202, which likewise deals with bribery, employs similar language:

> "Whoever, being an officer or employee of, or person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or agency thereof, or an officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or of both Houses thereof, . . ."

The language of 18 U.S.C. § 283, dealing with prosecution of claims against the government by government employees, is also illuminating:

> "Whoever, being an officer or employee of the United States or any department or agency thereof, or of the Senate or House of Representatives, . . ."

Another section of interest is 18 U.S.C. § 1505, which deals with influencing witnesses before certain bodies. This statute reads in part:

> "Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors

> to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; . . ."

If, as urged by appellant, Congress and its officers were agencies of the United States within the meaning of 18 U.S.C. § 6, there would be no occasion for these statutes to refer *both* to agencies *and* to Congress. It may consequently be concluded that Congress does not understand the phrase "department or agency" to embrace the legislative branch of the government.

18 U.S.C. § 6 does not contain the only definition of the term "agency" to be found in the United States Code. Numerous other definitions of this term demonstrate a general understanding on the part of Congress that it constitutes an apt description of executive instrumentalities alone. While these definitions are not applicable as such to 18 U.S.C. § 1001, they do buttress appellee's contention that Congress does not employ this term when it wants to describe a legislative or judicial officer.

The first definition of interest is found in 5 U.S.C. § 139c, which states:

> "The term 'Federal agency' means any *executive* department, commission, independent establishment, corporation owned or controlled by the United States, board, bureau, division, service, office, authority, or administration *in the executive branch of the Government; . . .*" (Emphasis added.)

Another definition of this term is found in 5 U.S.C. § 1001:

> "'Agency' means each authority (whether or not within or subject to review by another agency) of the Government of the United States *other than Congress, the courts,* or the governments of the posses-

sions, Territories, or the District of Columbia." (Emphasis added.)

Still another such definition is found in 22 U.S.C. § 802:

> "'Government agency' means any *executive* department, board, bureau, commission, or other agency *in the executive branch of the Federal Government*, or any corporation wholly owned (either directly or through one or more corporations) by the United States: . . ." (Emphasis added.)

Similar language is contained in 31 U.S.C. § 665:

> "When used in this section, the term 'agency' means any *executive* department, agency, commission, authority, administration, board, or other independent establishment *in the executive branch of the Government*, including any corporation wholly or partly owned by the United States which is an instrumentality of the United States." (Emphasis added.)

Of like import is 41 U.S.C. § 103:

> "The term 'Government agency' means any *executive* department of the Government, or any administrative unit or subdivision thereof, any independent agency or any corporation owned or controlled by the United States *in the executive branch of the Government*, and includes any contracting agency." (Emphasis added.)

Two significant definitions appear in Title 42. Section 1818 of this Title provides:

> "The term 'Government agency' means any *executive* department, commission, independent establishment, corporation wholly or partly owned by the United States which is an instrumentality of the United States, board, bureau, division, service, office, officer, authority, administration, or other establishment, *in the executive branch of the Government*." (Emphasis added.)

Section 1855a provides:

> "'Federal agency' means any department, independent establishment, Government corporation, or other agency *of the executive branch of the Federal Government*, excepting, however, the American National Red Cross." (Emphasis added.)

44 U.S.C. § 304 is equally explicit:

> "[T]he terms 'Federal agency' or 'agency' mean the President of the United States, or any *executive* department, independent board, establishment, bureau, agency, institution, commission, or separate office *of the administrative branch of the Government* of the United States *but not the legislative or judicial branches of the Government*; . . ." (Emphasis added.)

Finally, 50 U.S.C. § 403a states:

> "'Government agency' means any *executive* department, commission, council, independent establishment, corporation wholly or partly owned by the United States which is an instrumentality of the United States, board, bureau, division, service, office, officer, authority, administration, or other establishment, *in the executive branch of the Government*; . . ." (Emphasis added.)

The decided cases also reveal a uniform understanding that the term "agency" is not applicable to all three branches of the government. In *Bush Terminal Buildings Co.* v. *Comm'r*, 204 F. 2d 575, for example, the Second Circuit held that a federal constitutional court having jurisdiction of the taxpayer's reorganization proceedings was not "any Federal agency authorized to exercise regulatory power over such corporation," within the meaning of § 215(a) of the Revenue Act of 1939, c. 247, 53 Stat. 862. Likewise, in *United States* v. *Adams*, 115 F. Supp. 731, the court held that a federal court was not a "department, agency, court martial, officer, or any civil, military, or naval commission," within the meaning of

18 U.S.C. § 281. The same result was reached in the more recent case of *United States* v. *Waldin*, 122 F. Supp. 903, which was also decided under 18 U.S.C. § 281.

The case of *Romney* v. *United States*, 167 F. 2d 521, cert. denied 334 U.S. 847, relied upon by appellant's brief, does not in reality constitute authority contrary to appellee's position. There a Sergeant at Arms of the House of Representatives was convicted under the predecessor of 18 U.S.C. § 1001 for making false statements to the General Accounting Office. The decision of the court affirming his conviction cannot be considered a precedent in this case for three reasons.

In the first place, the applicability of the predecessor of 18 U.S.C. § 1001 to the General Accounting Office was not discussed. As this Court recently pointed out in *L. A. Tucker Truck Lines* v. *United States*, 344 U.S. 33, 38, no case may be considered authority on an issue not raised.

In the second place, revised Title 18 did not go into effect until after the *Romney* case was decided. There was in existence when this case was decided no predecessor of present 18 U.S.C. § 6. The terms "department" and "agency" had not been statutorily defined for the purposes of Title 18, nor was present 18 U.S.C. § 1001 yet in existence. The *Romney* case manifestly cannot constitute authority upon the meaning of a statute enacted *after* it was handed down.

In the third place, the General Accounting Office occupies a very different position from the Clerk of the House of Representatives. In certain respects and for certain purposes, this office may be considered part of the legislative branch of the government. In certain other respects, however, it partakes of the nature of an executive instrumentality. For example, it was set up to perform various functions which had previously been performed by the Treasury Department. 31 U.S.C. § 44. Its principal officers, moreover, are appointed by the President with the advice and consent of the Senate. 31

U.S.C. § 42. While it is made independent of the "executive departments" by 31 U.S.C. § 41, this does not mean that it is outside the *executive branch* of the government for the purposes of 18 U.S.C. § 6. The courts might well conclude that it should be considered an "independent establishment" within the meaning of 18 U.S.C. § 6. A decision on this point, however, could shed but little light upon the status of an officer of the House of Representatives, who is neither "independent" nor an "establishment."

Equally inapposite is the case of *United States ex. rel. Marcus* v. *Hess*, 317 U.S. 537, also relied upon by appellant's brief. This was a *qui tam* action under R. S. §§ 3490-3493, which created a right of action against persons who make false claims against the United States. Respondents had fraudulently obtained federal funds from certain state officials in connection with a Public Works Administration project. This Court held that their conduct constituted a false claim against the United States because they obtained federal funds through fraud.

Appellant suggests that the source of the funds allegedly converted in the instant case should likewise be decisive. This respondent, however, has not been convicted of making a false claim. He has been convicted of making a false statement, and the sole question before this Court is whether he made that false statement to a "department or agency of the United States." The origin of the funds, if any, which he may have incidentally converted can have no possible bearing upon the decision of this question. If the appellant desires to predicate its case upon the allegation that appellee converted federal funds, it must indict him for that offense, and not for making false statements.

The position adopted by appellant in this case must also be considered with reference to its effect upon the federal perjury statute, 18 U.S.C. § 1621. The maximum penalty prescribed for perjury under this statute is five

years imprisonment and $2,000 fine. The maximum penalty under § 1001, on the other hand, is five years imprisonment and $10,000 fine. The maximum penalty under the predecessor of § 1001, which was in effect from 1934 until 1948, was ten years imprisonment and $10,000 fine. If in fact § 1001 were applicable to false statements within the jurisdiction of any branch of the federal government, it is obvious that this statute would provide a heavier penalty for perjury than the perjury statute itself. And this penalty could be imposed upon witnesses in federal courts or before congressional committees regardless of whether they had been duly sworn and regardless of whether the government had complied with the "two-witness" rule. The very fact that no such attempt has been made in the twenty years since the predecessor of § 1001 was first enacted is almost conclusive evidence that the statute does not extend to the legislative or the judiciary. See *United States* v. *Williams*, 341 U.S. 70, 81; *F. P. C.* v. *Panhandle E. P. L. Co.*, 337 U.S. 498, 513-514; *United States* v. *Cooper Corp.*, 312 U.S. 600, 613-614; *F. T. C.* v. *Bunte Bros.*, 312 U.S. 349, 351-352.

Appellant attempts to avoid this dilemma by fabricating a definition of the term "agency" which includes the Disbursing Office but not congressional committees or federal courts. This definition, however, is not in accordance with either the common understanding of the term or the statutory definition of 18 U.S.C. § 6.

The term "agency" has two generally accepted definitions which must be considered. It can be used in its broadest sense to designate any person or group of persons acting under the authority of the United States. Any instrumentality of federal power could thus be denominated an "agency" of the United States. This might be characterized as the law of agency definition. It plainly embraces congressional committees and federal courts, as well as the Disbursing Office of the House of Representatives.

The word "agency" can also be used to designate those executive offices commonly known as "federal agencies." When we say, for example, that a man works for a government agency, we mean that he works in the executive branch of the government, and not for Congress or the courts. This might be characterized as the popular definition. It plainly excludes the Disbursing Office of the House of Representatives.

Both of the foregoing definitions are obviously unsatisfactory from appellant's point of view, the first because it includes too much, the second because it includes too little. Appellant has, therefore, tailored a definition which is somewhere in between the law-of-agency definition and the popular definition. Under this definition, the term "agency" must be understood in its "broad generic sense" to cover all instrumentalities of the United States "at least insofar as they act in an administrative, a fiduciary, or a housekeeping capacity." (Appellant's brief, p. 19.) This definition includes the Disbursing Office but excludes both congressional committees and federal courts. Presumably it would include an administrative assistant to a United States Senator but not the Senator himself. Presumably also it would include the Marshal of this Court but not the Justices to whom he is responsible.

Such a definition is obviously very different from the law-of-agency definition and from the popular definition of this term. Appellant urges that it is nevertheless consonant with the language and purpose of 18 U.S.C. § 6. The language of this statute, however, plainly adopts the popular definition of the term "agency." It says that an agency is "any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest." All of these terms have patent reference to those ramifications of the executive branch of the government which are commonly known as government agencies. They do not have refer-

ence to legislative officers who act "in an administrative, a fiduciary, or a housekeeping capacity."

In other words, § 6 requires us to determine whether the Clerk of the House of Representatives forms a part of something generally known as a "department, independent establishment, commission, administration, authority, board or bureau" of the United States. It does not require us to determine whether he is acting on behalf of the United States "in an administrative, a fiduciary, or a housekeeping capacity."

It is, of course, obvious that § 6 does not evidence "a design to throw a protective blanket over all administrative functions of government." (Appellant's brief, p. 12.) This statute is a definitional section intended to apply to every federal criminal statute which uses certain terms. It manifests a legislative intent to formulate a clear and workable definition of these terms. It does not manifest a legislative intent to throw a protective blanket over anything. Consequently, appellant cannot rely upon the legislative purpose behind this statute to sustain its position.

Nor can appellant successfully contend that the Clerk is an "authority" of the United States within the meaning of § 6. Obviously the word "authority" *can* be used to describe a legislative officer, just as it can be used to describe a congressional committee or a federal court. The question here is whether it *was* used to describe legislative officers in § 6. Under the rules of *noscitur a sociis* and *ejusdem generis*, this word must be construed in conjunction with the remaining terms used in defining "agency." All of these terms have patent reference to executive instrumentalities alone. Consequently, absent some compelling evidence to the contrary, it must be concluded that the word "authority" likewise refers to executive instrumentalities alone.

The Reviser's notes to Title 18, the language of Title 18 itself, the language of numerous other Titles of the

Code, and the relevant case law thus overwhelmingly support appellee's conclusion that the Clerk of the House of Representatives is not an "agency" of the United States within the meaning of 18 U.S.C. § 1001. Any other conclusion would necessarily result in abrogating the perjury laws. Appellant cannot avoid this dilemma by tailoring a definition of the term "agency" to meet the exigencies of this particular case, because its definition is contrary both to the common signification of the term and to the statutory definition of 18 U.S.C. §6.

II.

The Legislative History of 18 U.S.C. §1001 Does Not Support the Contention That It Applies to Matters Within the Jurisdiction of the Disbursing Office of the House of Representatives

Where, as here, the language of a statute is completely clear, there is no occasion to consider its legislative history. *Ex parte Collett*, 337 U.S. 55, 61; *Packard Motor Co.* v. *N. L. R. B.*, 330 U.S. 485, 492. The meaning of the term "agency" is set forth in simple and unambiguous language in 18 U.S.C. § 6. The whole purpose of this definitional section was to avoid litigation concerning the scope of criminal statutes and to obviate the necessity of resorting to the legislative history of such statutes to determine their meaning. To this end, Congress employed language which cannot possibly be made any clearer by judicial construction.

The legislative history of § 1001, however, actually supports appellee's position. The history of this statute makes it plain that Congress adopted § 1001 to do for the executive branch what the perjury statute had already done for Congress and the courts.

The Act of March 4, 1909, c. 321, § 35, 35 Stat. 1095, as amended by the Act of October 23, 1918, c. 194, 40 Stat. 1015, made it a crime to present any false claim to "any person or officer in the civil, military, or naval service of

the United States, or any department thereof, or any corporation in which the United States of America is a stockholder," or to make any false statement "for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder."

This Act was amended by the Act of June 18, 1934, c. 587, 48 Stat. 996. The 1934 Act left unchanged the provisions of the earlier law regarding false claims, but it amended the false statement provision to embrace such statements made "in any matter within the jurisdiction of any department or agency of the United States," eliminating the requirement of relationship to a false claim or intent to defraud.

The purpose of this amendment, as set out in S. Rep. No. 1202, 73rd Cong., 2d sess., was as follows:

> "The first two committee amendments were proposed by the Department of the Interior for the purpose of reaching a large number of cases involving the shipment of 'hot' oil, where false papers are presented in connection therewith, and also those cases within the Public Works Administration where contractors are performing work payable from the Public Works Administration appropriation, and false certificates are made as to actual wages paid."

The language here in question was thus adopted for the sole purpose of protecting the executive branch of the government from fraud and falsehood.

It is highly illuminating to compare the language of the 1934 amendment with the language of the prior law. The first part of the 1909 Act covered false claims made to "any person or officer in the civil, military, or naval service of the United States." It thus covered false claims made to any branch of the federal government. If Con-

gress had desired to punish false statements made to any branch of the federal government when it amended this Act in 1934, the logical course would have been to interdict false statements made to "any person or officer in the civil, military, or naval service of the United States." The fact that Congress eschewed this phraseology and prohibited instead false statements made "in any matter within the jurisdiction of any department or agency of the United States" is strong evidence that Congress did not intend the false statements section to be coextensive with the false claims section. It is strong evidence that Congress recognized and appreciated the danger of superseding the perjury laws by a new statute which covered false statements made to any branch of the federal government.

Appellant's assertion that Congress did not intend to restrict the scope of the coverage clause in this statute to the executive branch is thus the merest speculation. It is far more reasonable to suppose that Congress employed the new "department or agency" phrase, instead of the old "civil, military, or naval service" phrase, because it wanted to restrict the operation of the new statute to the only branch of the government which was then demanding additional protection against fraud and falsehood, namely, the executive branch.

III.

The Penal Character of 18 U.S.C. §1001 Requires This Court to Construe the Word "Agency" As Applicable Solely to the Executive Branch of the Government

It is one of the most basic principles of criminal jurisprudence that a penal statute must be strictly construed. This rule has been so often and so authoritatively reiterated that any citation of cases is almost superfluous. Because of the vital importance of this principle in the case at Bar, however, a cursory survey of the leading decisions seems appropriate.

Perhaps the most luminous exposition of this doctrine is that of Chief Justice Marshall in the case of *United States* v. *Wiltberger*, 5 Wheat. 76, 96, 105. This Court there held that a statute punishing manslaughter committed on the high seas did not apply to manslaughter committed on a river in China, although a companion statute punished the crime of murder committed on the high seas or on a river beyond the jurisdiction of any particular state. The opinion of the Court stated:

> "It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.
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> ". . . it appears that the argument chiefly relied on, to prove that the words of one section descriptive of the place ought to be incorporated into another, is the extreme improbability that Congress could have intended to make those differences with respect to place, which their words import. We admit that it is extremely improbable. But probability is not a guide which a court, in construing a penal statute, can safely take. We can conceive no reason why other crimes which are not comprehended in this act should not be punished. But Congress has not made them punishable, and this court cannot enlarge the statute."

Another early case of interest is *Harrison* v. *Vose*, 9 How. 372, 378, where the rule was stated in language very similar to that employed by the court below.

> "In the construction of a penal statute, it is well settled, also, that all reasonable doubts concerning its meaning ought to operate in favor of the respondent [defendant]."

This Court has frequently recognized that an act is not punishable under a statute merely because it involves

the type of evil which the statute was designed to remedy. In the case of *Fasulo* v. *United States*, 272 U.S. 620, 628-629, for example, where this Court held that a statute punishing use of the mails to defraud did not cover use of the mails to extort money by threats of murder or bodily harm, it is stated:

> "Undoubtedly the obtaining of money by threats to injure or kill is more reprehensible than cheat, trick or false pretenses; but that is not enough to require the court to hold that a scheme based on such threats is one to defraud within § 215. . . .
>
> ". . . There are no constructive offenses; and, before one can be punished, it must be shown that his case is plainly within the statute."

A classic opinion on this point was written by Mr. Justice Holmes in *McBoyle* v. *United States*, 283 U.S. 25, 27, where this Court held that a statute prohibiting the transportation of stolen motor vehicles did not apply to the transportation of stolen airplanes, although the term "motor vehicle" was defined to include "any other self-propelled vehicle not designed for running on rails." Mr. Justice Holmes stated:

> "Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. . . . [T]he statute should not be extended . . . simply because it may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely broader words would have been used."

Very similar in many respects to the case at Bar is the case of *Pierce* v. *United States*, 314 U.S. 306. There this Court held that the impersonation of an official of the

Tennessee Valley Authority was not within the purview of a statute dealing with impersonation of "an officer or employee acting under the authority of the United States, or any Department, or any officer of the Government thereof." This case, like the *Fasulo* and *McBoyle* cases, makes it clear that a defendant cannot be punished under a given statute merely because his acts are equally as reprehensible as those which are covered by the plain language of the statute.

Another leading case in this field is *Viereck* v. *United States*, 318 U.S. 236, 243-244, 245, where this Court held that a statute requiring foreign agents to disclose their activities "as agent of a foreign principal" did not require an agent to disclose propaganda activities which merely inured to the benefit of a foreign principal. The opinion of the Court stated:

> "While Congress undoubtedly had a general purpose to regulate agents of foreign principals in the public interest by directing them to register and furnish such information as the Act prescribed, we cannot add to its provisions other requirements merely because we think they might more successfully have effectuated that purpose.
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> * * * * *
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> "Even though the specific restriction of § 3(c) were due to defective draftsmanship or to inadvertence, which hardly seems to be the case, men are not subjected to criminal punishment because their conduct offends our patriotic emotions or thwarts a general purpose sought to be effected by specific commands which they have not disobeyed. Nor are they to be held guilty of offenses which the statutes have omitted, though by inadvertence, to define and condemn. For the courts are without authority to repress evil save as the law has proscribed it and then only according to law."

Other cases in point include *United States* v. *Halseth*, 342 U.S. 277; *M. Kraus & Bros.* v. *United States*, 327 U.S. 614; *United States* v. *Resnick*, 299 U.S. 207; *United*

States v. *Fruit Growers Express Co.*, 279 U.S. 363; *Krichman* v. *United States*, 256 U.S. 363; *United States* v. *Weitzel*, 246 U.S. 533; *United States* v. *Harris*, 177 U.S. 305.

These cases make it clear that this Court cannot apply 18 U.S.C. § 1001 in the case at Bar merely because false statements made to a legislative officer are as deserving of condemnation as false statements made to an executive officer. It is not enough that a similar policy applies in both instances, or that Congress, if it had considered the matter, might have employed broader language. Even if the restriction of this statute to the executive branch were the result of inadvertence or defective draftsmanship, the courts are powerless to extend its coverage. Before we can say that the court below erred in arresting judgment, we must find that appellee's conduct was plainly and unmistakably within the actual language of the statute itself.

The foregoing sections of this brief make it clear that the Disbursing Office of the House of Representatives is not plainly and unmistakably within the scope of the term "agency" as defined in 18 U.S.C. § 6. For this reason, the court below properly granted appellee's motion in arrest of judgment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the District Court granting appellee's motion in arrest of judgment should be affirmed.

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